[2018] UKFTT 278 (TC)

TC06508

Appeal number: TC/2017/05406

EXCISE DUTY – seizure of unprocessed tobacco - refusal to restore- decision based on alleged failure to prove ownership - whether ownership established – yes - decision based on alleged suspicion of complicity in the production of illicit tobacco products - whether unreasonable - yes - Customs and Excise Management Act 1979, Sections 49, 139, 141, 152 and 170 - Appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MACIEJ KOTARSKI **Appellant**

- and -

THE DIRECTOR OF BORDER FORCE **Respondent**

TRIBUNAL: JUDGE W RUTHVEN GEMMELL WS

MEMBER: MS PATRICIA GORDON

Sitting in public at the Royal Courts of Justice, Belfast, on 4 May 2018

The Appellant represented himself

Mr Craig Dunford, Barrister, for the Respondent

DECISION

Introduction

1. Maciej Kotarksi ("MK") appealed on 26 June 2017 against a decision by Border Force ("BF") issued on 15 March 2017 and upheld on review on 30 May 2017 not to restore seized leaf whole tobacco citing amongst other grounds that there was insufficient proof of ownership.

2. Following the review decision and MK's application to appeal that decision to the Tribunal, BF wrote on 4 August 2017 commenting on further information as to the proof of ownership and requesting "a clear audit trail, through MK's business records and bank details…..to be presented prior to any tribunal hearing".

3. Correspondence continued and came to an end with a letter from BF dated 20 September 2017 to MK stating that BF considered that insufficient evidence had been produced to show that MK had purchased the raw tobacco in the course of his business and even if he were able to establish legal title to the goods, it would be reasonable for BF to conclude that the goods should not be restored for the reasons stated therein.

4. MK's grounds of appeal and the result he sought stated (1) that raw unprocessed tobacco leaves are not liable to excise duty on importation and consequently that BF had made a mistake in law when seizing the tobacco on the grounds that they had been acquired with the intention of taking steps with a view to the fraudulent evasion of excise duty; (2) that he was the owner of the tobacco; (3) that he had been found not guilty of the intention to evade the payment of duty at Chelmsford Crown Court in February 2017; and (4) that BF should make a compensation payment as MK's "company suffered serious losses".

5. Mr Dunford, for BF, advised that he had been instructed on 20 April 2018 which was the date on which BF's skeleton argument had been directed to be delivered to the Tribunal and to MK. Accordingly, an application for an extension of time of seven days was served on the Tribunal and on MK who noted no objections. At the date of the hearing this application had not been responded to and, accordingly, the Tribunal granted the application and noted that the skeleton argument had been served on 25 April 2018.

6. Evidence was given by Ms Helen Perkins, a Review Officer of BF, and author of the letters from Border Force dated 30 May 2017 and 20 September 2017, and by MK who were both credible witnesses.

Legislation

7. See Appendix 1.

Cases Referred To

8. See Appendix 2.

The Facts

9. On 7 August 2015, MK was intercepted at the port of Harwich driving a van, hired from Enterprise van hire in Germany that contained 602.2 kg of unprocessed tobacco ("the goods") on the grounds that they were acquired with the intention of taking steps with a view to fraudulently evading excise duty. BF alleges that, after processing, the tobacco would attract duty of £669,072.63. Copies of the BF Officers' notebooks with details of the stop and search, arrest and subsequent search were before the Tribunal, together with a bundle of correspondence.

10. MK was arrested, interviewed and bailed on 7 August 2015. A more thorough search of the goods discovered a tobacco cutting machine which MK stated he had bought because he planned to set up a business processing tobacco. In evidence MK stated that the machine was incomplete and that it had been purchased using cash, including cash he had borrowed from his stepfather. MK stated at an interview on 18 November 2015 that he had no business plan in place for the business he planned to set up to process tobacco, as he intended to build up his business selling raw tobacco first.

11. The goods were seized under section 139 of the Customs and Excise Management Act 1979 (CEMA) as being liable to forfeiture under section 49(1)(a)(i) and section 170B of CEMA. In a criminal trial in connection with the seizure, on 13 - 16 February 2017, MK was found not guilty of criminal offences.

12. A BF Seizure Information Notice and Notice 12A were issued on 7 August 2015, notifying MK of the right to challenge the seizure in the Magistrates' Court. MK by a notice dated 5 September 2015 ("the return notice") stated that he believed the goods should be returned. BF produced a copy of the return notice showing it having being received on 8 September 2015, together with a copy of the envelope which had been sent by Royal Mail Special Delivery post also stamped as received on 8 September 2018.

13. MK gave oral evidence that he posted the letter on Saturday, 5 September 2015. The envelope which clearly showed the Special Delivery barcode did not state the date of posting. It was noted that Special Delivery provides a next day service and as Sunday is excluded as a delivery day, this would mean that if the letter was posted on Saturday, 5 September 2017 it should have been delivered on Monday, 7 September 2015. At the hearing MK could provide no evidence, such as the Royal Mail Special Delivery receipt which showed the actual date of posting.

14. BF wrote on 8 September 2015 acknowledging receipt of the letter of 5 September 2015 stating that they would now begin processing MK's case. On 7 October 2015 BF wrote to MK referring to his letter "received on 8 September 2015" and stating that the return notice was out of time. It stated "As your request was received on the 7th September 2015 it is outside this time limit, (one month of the date of seizure), therefore I regret we are unable to accept your appeal".

15. MK responded to this letter stating that as the date of receipt was 7 September 2015 it was, therefore, "on time and should be accepted". BF responded to this letter on 23 October 2015 referring again to the letter of 7 October 2015 from BF but stating this time "As your request was received on the Tuesday 8th September 2015 it is outside this time limit, therefore I regret we are unable to accept your appeal". MK was asked why, at the hearing, he had not responded to this discrepancy and his response was that he had received two letters and did not know which one to believe.

16. BF proceeded on the basis that the return notice was out of time and that no appeal could then be made to the Magistrates' Court as a civil law case.

17. BF wrote to MK on 1 October 2015 in relation to MK's request for restoration of the goods requesting proof that MK had made payment for the goods, stating, "i.e. copy of credit card/bank statement and any invoices". The letter continued "if you have any other documentation relating to the goods which support the claim for restoration please forward a copy to the above address as soon as possible. This is your opportunity to bring to our attention any information you would like us to consider in support of the request for restoration".

18. The 1 October 2015 letter stated that BF would start condemnation proceedings in the Magistrates' Court and that MK would be required to claim ownership of the seized goods on oath in court usually at a preliminary hearing. It stated that if the Magistrates did not accept that the claim that the seizure was unlawful, they would condemn the goods as liable to forfeiture and the goods would remain the property of the BF. Alternatively, if the court were to find in MK's favour, then the goods would be returned to him.

19. On 15 March 2017 MK received a letter from BF stating that the goods were liable to forfeiture under section 170B CEMA because of the intent to evade the payment of duty and stating that "on this occasion the goods will not be restored". An offer was made of an impartial review by a Review Officer.

20. On 20 April 2017 MK responded stating that he believed that BF had made a mistake in law in his case and because of the period of time when the goods were held by BF it had lost marketable value. The letter set out the losses which MK said his 'company' had suffered. MK stated at the hearing that the word 'company' was himself as a sole trader not a limited company. The letter stated, "I had to suspend any activity on the field of selling raw tobacco leaves for 19 months and on the field of establishing tobacco manufacturing for 12 months. Before 7 August 2015 I had what was shown in court, potential wholesale customers for 1000 kg raw tobacco per months with price around £15 per kilo. It gives earnings, after costs deduction, £7500 per month, £142,500 during the period 19 months. The Prosecutor counted, that after manufactory raw tobacco to the hand rolling tobacco and paying excess duty my earnings should be between £233 and £400 per kilo. My business plan assumed far lower rate between £80 and £130 per kilo and the sale 200 kg per months. It gives £252,000 per 12 months. Altogether my company suffered loss around £394,500".

21. MK was asked to reconcile this latter sum of £394,500 with the claim in his notice of appeal dated 26 June 2017 of £508,500 and explained that by the date of the appeal notice he had had to suspend any activity on the field of selling raw tobacco leaves for 23 months and on the field of establishing tobacco manufacturing for 16 months and that his business plan assumptions were for a period of 16 months.

22. MK explained that these compensation claims were based on his belief that he could sell unprocessed tobacco as a continuous trading activity and reinvest his profits to increase the amount sold which he believed would have enabled him to have then commenced the activity of tobacco manufacturing.

23. Ms Helen Perkins carried out her review and wrote to MK on 30 May 2017 noting that MK had lived in Northern Ireland for eight years and had a business of buying and then selling raw tobacco on the Internet. MK had flown from Dublin to Germany where he had hired a van for one week. He then drove to Poland and purchased tobacco before driving to Harwich in the UK.

24. The letter continued that MK had informed Officers that the total cost of the journey was approximately £2,000 and that MK expected to sell the tobacco for £10,000-£15,000. MK was not clear as to why people would purchase it but suggested it could be used to keep rats away. MK had said that he knew and always informed customers that they should inform HMRC if any of them wanted to process the raw tobacco for smoking. MK had previously been involved in importing raw tobacco on three occasions but this was the first time he had imported it for himself.

25. Reference was made to the cutting machine which MK had told Officers he had purchased because he had plans for a future business that would involve processing tobacco. He said, at the hearing, he had no written business plan in place for this (it was 'in his head') and he was hoping to build up his tobacco selling business before setting up the manufacturing business and that the machine was 'incomplete'.

26. Officers had noted that HMRC had only received his registration as a sole trader selling unprocessed tobacco on 20 October 2015 and it had been backdated to 5 August 2015. MK was asked at the hearing why he had registered the business on 22 October 2015 and he replied that he knew he had to do so within three months of issuing an invoice but he had not issued an invoice beyond that requisite period. MK was then asked why he had backdated the registration date to 5 August 2015 to which he replied that he thought it would "assist with the restoration issue and not because he had issued an invoice".

27. Ms Perkins decision was made on the assumption that the Magistrates Court would find that the seizure was lawful and that any seized goods were improperly imported and that the court would therefore duly condemn the things as forfeit to the Crown. At the conclusion of the criminal case, at which MK was acquitted, BF considered and refused a request to restore the goods.

28. The letter of 30 May 2017 continued that the general policy of BF is that seized goods should not normally be restored but that each case would be examined on its merits to determine whether or not restoration may be offered exceptionally. MK was advised that although he had been found not guilty at the Crown Court a restoration decision by BF made on review uses the civil standard of the balance of probabilities. This contrasts with a beyond reasonable doubt standard of proof which would be applicable in a criminal action.

29. The letter continued that the legality or correctness of the seizure itself could not be considered as this was a matter for the Magistrates' Court and the return notice was out of time. MK was advised that the onus for making the case for restoration rested with him. MK was advised that BF had received no supporting documentation to clearly evidence that MK actually financed the goods and that he was the legal owner and consequently BF were not satisfied that he held the legal title to the goods and BF declined to restore them. The letter concluded that if MK was able to provide BF of proof of legal title in relation to the goods then Ms Perkins would be prepared to revisit her decision.

30. Correspondence continued with reference to the production of an invoice or "Faktura" dated 6 August 2015 showing the supply of 600 kg of tobacco for 4050 PLN (£861 which includes £63 of tax). MK stated that the invoice was sufficient proof of ownership for him to be arrested by Border Force and for an investigation to be run against him by the Police, for the Prosecutor to prosecute him and for his cases in the Magistrates' and Crown Courts.

31. At the hearing a distinction was made between the ownership of any goods and the liability of anyone transporting them with the latter not always being the owner. MK made reference to what was said to be a similar case in France in mid-December 2014 but Ms Perkins who had no knowledge of the case was understandably unable to comment.

32. MK stated that the Faktura, written in Polish, stated that payment for the tobacco was in cash (in Polish "Gotowka").

33. MK wrote on 6 September 2017 stating that as a sole trader he did not need to "compulsory have, business bank account" and that he had no obligation to have such an account for accountancy. He continued, "I have to only keep in record documents which confirm my expenses and revenues. In the light of this fact there is no any background to demand from me any additional documents to prove of ownership the goods stated on the invoice". This letter enclosed "my personal bank statement which shows withdrawals prior to and on the date of the invoice confirmed buying 600 kg of tobacco by me"

34. The bank statement related to a Santander account summary page for the period 31 July 2017 to 29 August 2017 (sic) but which contain the detailed transactions for the period only from 4 August 2015 to 8 August 2015. MK was cross-examined on the entries and an explanation given as to the non-sterling purchase fees and the other expenses as shown in the statement. MK drew attention to the

cash withdrawals made in Poland on 6 August 2015 of 1550 PLN and on 4 August 2015 of 1700 PLN totalling 3250 PLN. A further withdrawal had been made at Dublin airport on 3 August 2015 of £263.12 which MK stated he had exchanged for PLN in Poland for which he no longer had any voucher evidence, and which would equate to approximately 1500 PLN. Consequently, the total amount of PLN withdrawn between 3 August 2015 and 6 August 2015 was 4750 PLN and which MK stated had been used to pay the Faktura total cost of 4050 PLN.

35. MK explained that the number of transactions on different days was as a consequence of the withdrawal limit on his card of £300 per day.

36. On 20 September 2017 Ms Perkins noted these cash withdrawals but stated that "the bank statement itself, does not demonstrate that the money withdrawn from your account was actually used to purchase the raw tobacco. Therefore, my original decision..... not to restore the goods remains, as the legal title has not been proven." It continued to inform MK that he was required to have a clear record of personal and business-related accounts and that he had presented insufficient information that clearly showed that he purchased the goods in the course of his business.

37. At the hearing Ms Perkins stated that it was not unreasonable to expect that there was a non-personal account for tax purposes to keep records of transactions and that she had not been supplied with anything to make the link between the payments and the purchase of the goods. Ms Perkins also stated that she had not been satisfied that the payments were for the tobacco because two of them were in PLN and that the total amount of them was insufficient to equate to the cost of the goods.

38. Ms Perkins also stated that she believed the funds taken at Dublin could have been used for diesel/food or hotels and in the course of the hearing MK was asked why he had not provided information relating to these types of expenses as a proof that the funds withdrawn in cash had been, as he maintained, used to purchase the tobacco.

39. MK responded that he had been asked to provide evidence that he had purchased the tobacco and had literally done this and could not provide any further evidence which he acknowledged he had been asked for. The only evidence he had was the Faktura and the details of the withdrawals which provided him with the cash, he said, he used to pay for the goods. MK accepted the premise that he would have to prove ownership and that BF were entitled to withhold restoration so as not to deprive true owners of their goods or return them to someone who is not the legal owner.

40. MK stated that he had paid his other expenses including the van hire by debit card or in cash and as far as he could recollect was not required to pay a deposit for the hire of the van but recalled having to pay for its insurance. The bank statement and the extracted entries did not show the cost of the hire of the van and the purchase of the tobacco cutter was financed as noted previously. MK could not

recall the cost of his flight to Germany but thought it was paid for by using his Santander bank account card. MK stated that he only had a debit card for his Santander account and no additional or any other credit or debit cards nor any other bank accounts at that time.

41. In her letter of 20 September 2017, Ms Perkins referred to MK's explanation to BF Officers that he had previously worked with his son running a company, KK services but was currently operating independently importing tobacco and had shown an advert for his website which translated as "tobacco leaves for sale in the UK". The letter made reference to the Tobacco Products Regulations 2001 which include a provision that requires that tobacco products are manufactured on premises, which are referred to as registered factories, and which may be registered. The letter stated "I have not been presented with any evidence from you that clearly demonstrates that the premises the goods were destined for on import were 'registered' or that the tobacco was being imported for a specified legitimate purpose that properly discloses 'end use' ".

42. Reference was made to the High Court decision of *Amber Services Europe Ltd & Another v. The Director of Border Revenue* [2015] EWHC 3665, and to LJ McCombe's statement, "Anyone using raw/unprocessed tobacco for the purposes of making a tobacco product is required to register their premises as a factory… Whilst there may be other uses of tobacco leaf and products such as pesticides, wood staining and animal bedding there was no evidence that that was the intended use for the goods imported… I would expect commercial-sized imports of raw/unprocessed tobacco products entering the UK to go to premises registered for the manufacture of tobacco products."

43. Ms Perkins' letter then made reference to previous seizure by BF on 23 November 2014 of 400 kg of raw unprocessed tobacco which was imported from Poland and which was unloaded at a business address from which MK's son traded. The goods were believed to be destined for sale within the illicit tobacco trade. No evidence was provided or found of a registered excise trader at the delivery address and the business activity, which was classified as retail financial, was not compatible with the goods being imported. When HMRC officers attended the premises MK was present and confirmed the identity of his son and that "the company" had yet to be formally registered and that his son had seen a market for tobacco leaf so he had purchased some from the Czech Republic. MK further explained that his son did not intend to processes the raw tobacco in any way and that he intended to sell it in small portions to customers. When asked for what purpose, MK replied that he believed it could be used by "gardeners to repel slugs/snails". Ms Perkins wrote, "This alone provides me with good reason to suspect that you were complicit with your son/the company on this occasion, when previous raw tobacco was seized by BF".

44. The letter continued that "this view is further reinforced when I consider further seizures that I am aware of associated with your son…. and the business operating under KK services." The letter then listed the seizure of 240 kg, on 15 December 2015, 240 kg, on 7 January 2016 and 52 kg, on 25 January 2016.

45. At the hearing MK denied all knowledge of these three seizures and advised that he had not spoken to his son following family differences since August 2015.

46. Ms Perkins' letter continued "Taking into account the above seizures by BF; the significant quantity of tobacco involved and the potential risk to the UK revenue were those goods to have entered the illicit market, I am satisfied, on the balance of probabilities, that you and your son are together inextricably linked in commercial ventures dealing in 'raw' tobacco used in the production of illicit tobacco products in which UK excise duty is not accounted for. BF Officers also found a cutting machine for tobacco concealed under the tobacco when you were intercepted. This found together with tobacco is indicative of the intent to process tobacco and given that you admitted you intended to sell the tobacco, it is not unreasonable that I conclude that you also intended to process it. You are also required as a sole trader to register with HMRC as soon as possible after starting a business. I understand HMRC only received your registration as a sole trader for the purpose of selling 'unprocessed tobacco' on 22 October 2015 and you back-dated the registration to 5 August 2015 prior to the seizure. I believe this is an attempt by you having goods seized to legitimise your business activities. Therefore, in the above circumstances, it is also fair, reasonable and proportionate not to offer restoration and seized goods."

47. MK stated at the hearing he intended only to manufacture tobacco when he had traded sufficiently to build up his selling raw tobacco business to an appropriate size in what he hoped would have been six to nine months later and that he never intended to manufacture the tobacco that was seized.

48. When asked why MK had not responded to the issues raised in the letter of 20 September 2015, MK stated that he had previously submitted his appeal (26 June 2015) and wished to leave matters to the Tribunal and, to the Tribunal hearing, as the best way of dealing with it.

MK's Submissions

49. MK referred to *Mariusz Wnek v Director of Border Force* [2013] UKFTT 575 (TC) as his authority for his submission that dry loose leaf tobacco is not a tobacco product and consequently is not liable to duty. In seizing and refusing to restore the goods on the basis that they were liable to duty, BF had made an error in law and consequently their decision not to restore was unreasonable. Consequently he challenged the legality of the seizure of goods and reasonableness of BF in deciding whether or not to restore the goods.

50. MK says that he sent the return notice in time by posting by Special Delivery on 5 September 2015 which he believed was in time to meet the deadline. He then received two letters which appeared to be contradictory and did not know which one to believe.

51. MK says he was asked to prove ownership of the tobacco, not to provide details of extraneous and incidental expenditure and he did what he thought he was asked;

that is to say, provide statements that related to that issue. The only information he could provide were the withdrawals of cash and the invoice. The explanation for the different sums of money being withdrawn on three separate days related to the limit on withdrawals on his Santander debit card and that he exchanged the currency taken in Dublin for PLN.

52. He says that he is not required by law to open a business bank account as a sole trader and that he registered his business with HMRC when he believed it was appropriate to do so but that he did backdate it to assist his claim for restoration of the tobacco. MK says that he only had one bank account so entries were either through that account or were cash payments.

53. MK denies being complicit with his son and being inextricably linked with him in commercial ventures, dealing in tobacco used in the production of illicit tobacco products on which UK excise duty is not paid.

54. MK says that the tobacco cutting machine was not fully operative and had been purchased for approximately 500 PLN, some of which money he obtained from his stepfather. He made a statement to the Officers when first arrested that he was thinking of manufacturing but in the future. He trades in the sale of tobacco and advises anyone who buys it that they are required to inform HMRC if it is manufactured. The tobacco cutter was only found at a later date after he had been arrested and was not in the knowledge of those arresting him when they did so.

BF's Submissions

55. BF say that the Tribunal's powers are confined to those set out in section 16(4) and (5) of the Finance Act 1994 and do not include the power to award compensation.

56. BF say that the return notice was served late on 8 September 2015 as it was correctly required by 7 September 2015 and that in terms of section 7 of the Interpretation Act 1978, nothing contrary has been proved to dislodge the presumption that it was delivered in the ordinary course of post. It was posted by Special Delivery (which is a next day, excluding Sunday, service) and by deduction must have been posted on 7 September 2015, in the absence of evidence to the contrary, if it was received on 8 September 2015. It was, therefore, out of time.

57. Consequently, the Crown is the owner of the goods and BF has a discretionary power to restore forfeited property under section 152 CEMA. The Tribunal following the judgement of *HMRC v Lawrence Jones & Anor* [2011] EWCA Civ 825 and particularly at paragraph [71] does not have the jurisdiction to reopen that matter on a restoration appeal. All that the Tribunal can do is exercise the limited jurisdiction conferred upon it by section 16 of the Finance Act 1994.

58. This provision limits the Tribunal to acting only if it considers that the BF acted unreasonably in refusing restoration under the discretionary power conferred by section 152 CEMA. The burden of proving unreasonableness rests upon the

appellant as set out in *Brandon v HMRC* [2017] UKFTT 553 (TC) in particular at paragraph [26].

59. BF say that the issue of the goods being not liable to excise duty because of MK's acquittal of criminal charges in February 2017 does not, following LJ McCombe's judgement in *Amber Services Europe Ltd v The Director of Border Revenue* [2015] EWHC 3365 and particularly at paragraph [16], have a bearing on the determination of ultimate liability to forfeiture which is affected in civil proceedings under Schedule 3 CEMA.

60. BF say that MK has failed to show he is the owner of the goods and that they have a policy of restoring seized goods only to the legal owner of such goods which received clear judicial approbation in *Worx Food & Beverage BV v The Director of Border Revenue* [2014] UKFTT (TC), in particular, paragraphs [56], [58], [66] and [80 to 82].

61. This case related to the seizures of mixed beers, vehicles and trailers and where BF refused restoration. The Tribunal's conclusions were based on the lack of evidence to identify ownership of the precise goods which had been seized because there was "no way of linking the seized goods to the documents" [paragraph 56]. The case also considered the proportionality of the decision-making and reference was made to *Lindsay v HMRC* [2002] where Lord Phillips, MR, who gave the leading judgement, said

> "The commissioners' policy involves the deprivation of people's possessions. Under art 1 of the First Protocol to the convention such deprivation will only be justified if it is in the public interest. More specifically, the deprivation can be justified if it is 'to secure the payment of taxes or other contributions or penalties'. The action taken must, however, strike a fair balance between the rights of the individual and the public interest. There must be a reasonable relationship of proportionality between the means employed and the aim pursued (*Sporrong and Lonroth v Sweden* (1982) 5 EHRR35, para 61; *Air Canada v UK (*1995) 20 EHRR 150, para 36). I would accept Mr Baker's submission that one must consider the individual case to ensure that the penalty imposed is fair. However strong the public interest, it cannot justify subjecting an individual to an interference with his fundamental right that is unconscionable"

62. The *Wrox Food* Tribunal went on to say that failure to prove ownership was compliant with Article 1 Protocol 1 and that UKBF's general policy of requiring proof of ownership is proportionate within the meaning of the Convention. It stated at paragraph [82]

> "The evidence provided by them (the appellant) in support of its claim to own the goods was inadequate and (the respondent - the UK Border Forces') decision to refuse to restore was proportionate".

63. BF say that MK has failed to provide evidence of ownership based on the material that was submitted to them up to 21 November 2017 that does not on the balance of probabilities show that MK is, or was, the legal owner of the goods.

Decision

64. The Tribunal considered that in light of the provisions of section 16(4) and (5), the Finance Act 1994 it does not have the power to award compensation and, accordingly, this ground of appeal cannot be considered.

65. Similarly, the Tribunal considered that it did not have jurisdiction to reopen the matter on a restoration appeal in light of the Court of Appeal case in *HMRC v Lawrence Jones* (above) as the return notice was out of time for purposes of paragraph 3 of Schedule 3 CEMA having been received a day late on 8 September 2015. Given that the return notice was sent by Royal Mail Special Delivery it should have been possible to prove the date of posting as opposed to a letter posted in the ordinary course without any guaranteed delivery date or formal recording mechanism. However, no additional evidence was available at the Tribunal hearing other than MK stating that he had posted it on Saturday, 5 September 2015 and BF stating and supplying documentary evidence that it and the envelope that contained it had been received on 8 September 2015. As BF stated, it was surprising that this matter was not investigated by MK given the ambiguity that may have been caused by BF's seemingly contradictory letters. However, it was not.

66. Accordingly, therefore, the provisions of paragraph 5 of Schedule 3 CEMA take effect and "the thing in question shall be deemed to have been duly condemned as forfeited" and the provisions of section 152 CEMA which provide:

> "s. 152 Powers of Commissioners to mitigate penalties, et cetera
>
> The commissioners may, as they see fit-
>
> …..
>
> (b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts".

67. As succinctly stated by Judge Mosedale in *Brandon v The Commissioners for HMRC* [2017] UKFTT 553 (TC)

> "The law gives the Tribunal a jurisdiction over UKBF's decisions on restoration but only to a limited degree. The jurisdiction is contained in section 16 of the Finance Act 1994 which provides that:
>
> > (4)… the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal is satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to……..
> >
> > (6) On an appeal under this section the burden of proof as to-… shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established."

In summary, Mr Brandon (the appellant in that case) can only succeed in his appeal if he can demonstrate that (section 16 (6)) that UKBF's refusal to restore the van to him was unreasonable. It is well established by binding authority that a decision is unreasonable only if the decision-maker applied the wrong legal test, took into account irrelevant considerations, failed to consider relevant considerations or acted in a way in which no reasonable decision maker could have acted in the same circumstances. In other words it is not enough for Mr Brandon to show that a different decision-maker might have reached a different decision: he would have to show the decision was actually unreasonable".

68. The Tribunal prefers and accepts BF's submission that the relevance of an acquittal in a criminal matter is as set out in *Amber Services Europe Limited* as regards the issue of forfeiture.

69. MK's position is that he purchased the goods with cash and when asked by the Officer, when he was stopped at Harwich, said that he was carrying tobacco in his van and that this was his first time purchasing tobacco on his own whereas previously he had done so for his son. When asked why he was not now doing for his son he replied "things not so good". MK also handed the Officer the invoice showing the purchase cost at 4050.50 PLN. A few minutes later he was arrested on suspicion of being involved in the fraudulent evasion of excise duty and given a "caution".

70. MK admitted that he had received letters from BF requesting further information as to his proof of ownership of the goods, in addition to the invoice, but relied on, ultimately, showing extracts from his bank account. In her evidence Ms Perkins asserted that she was not convinced that sufficient cash could have been withdrawn through that bank to pay for the purchase of the goods as she believed he would have had insufficient PLN to do so. At the hearing, MK explained that an additional payment had been taken from an ATM on 3 August 2015 at Dublin airport and MK claimed he had converted this into PLN at an exchange rate which resulted in him having a total amount of PLN and well in excess of the amount of the invoice. The Tribunal considered that this was a relevant consideration that had not been taken into account when the review decision was made.

71. BF was repeatedly asked at the hearing what further information MK could provide for a cash purchase of the goods. Given the explanation of the entries on the bank statement, the fact that the dates of the withdrawals either matched or were sufficiently near to the purchase of the goods, which in turn were evidenced by an invoice, the Faktura, showing MK as the purchaser and which showed, in Polish, that payment was by cash, the Tribunal had some difficulty in ascertaining what further information could ever be provided to evidence a cash transaction other than the source of the cash and a receipt or invoice.

72. When MK was arrested on 7 August 2018, he told the Officer that the reason for his purchase of the tobacco was to sell it "depending on how much people want". MK stated that he only had one bank account which was linked to a debit card and the Tribunal considered that when he was asked for evidence to prove his

ownership of the goods he concentrated on that, without considering whether the expenses of his trip, which he had in any event advised Officers was in the region of £2,000, would be or could be relevant to the purchase of the goods. As stated in the letter of 30 May 2017, he was asked in a letter dated 1 October 2015 "to provide proof that you own the seized goods that should include proof that you have made a payment for the goods i.e. the copy of a credit card/bank statement". This is what he produced and it was noticeable at the hearing that whereas MK's spoken English and understanding was generally of a very high standard there were some occasions where his understanding was less sure.

73. The Tribunal considered that whether or not his financial records were to a satisfactory standard to comply with the Taxes Acts, on which no other evidence was produced, MK provided as clear an audit trail through his bank statement that he was able to do for a cash purchase in circumstances were there was no corroboration from another witness to the actual transaction. The Tribunal could not envisage how his bank statement showing withdrawals of cash could in any way have more closely or succinctly connected the withdrawals to the payment for the goods other than (a) the dates on which the withdrawals were made, and (b) the amounts. In this case both of those factors are connected to the invoice for the goods. The Tribunal accepted MK's evidence that he only had one bank account and was a sole trader and had no separate business account.

74. BF had drawn the Tribunal's attention to the case of *Worx Food* (above) as clear judicial approbation of BF's policy of restoring seized goods only to the legal owner of such goods. The Tribunal considered that this case can be distinguished from the circumstances relating to MK as the issue before that Tribunal was of linking the seized goods to the documents. The similar issue in this case would be the linking of the invoice to the goods which was not an issue raised by BF. In *Wrox Food* the issue was about identifying goods in the Queen's Warehouse and the lack of any documentation to identify them. In relation to the evidence of payment, *no documentary evidence of payment "such as credit notes and bank statements (emphasis added)……* was provided in advance of the review decision". Whereas this was the position in relation to the 30th May review decision, by the time of the Tribunal hearing the bank statement had been provided and considered in the letter of 20 September 2017.

75. For these reasons including the evidence which became apparent after the date of the appeal notice and which was therefore only based on the evidence before Ms Perkins on 30 May 2017, the bank statements having not been submitted to BF until 6 September 2017, the Tribunal consider that on the balance of probabilities MK was the owner of the goods.

76. The letter from BF to MK of 20 September 2017 was not, on MK's evidence, responded to as he wished to have the matters raised therein dealt with at the Tribunal hearing. Accordingly, it was only at the hearing that MK addressed the issues in relation to his son and the allegation that the BF made, on the balance of probabilities, that MK and his son were together inextricably linked in commercial ventures dealing in "raw" tobacco used in the production of illicit tobacco

products, on which UK excise duty is not accounted for. Linked to this was the evidence of the cutting machine for tobacco "concealed under the tobacco when you were intercepted" and BF's "not unreasonable" conclusion that MK intended to process it.

77. At the hearing MK stated that whereas he was present when HMRC officers attended the premises of his son on 9 February 2015 and confirmed that he had said that his son did not intend to process raw tobacco, MK denied knowing anything about the three referred to seizures of tobacco and stated that he had not spoken to his son since August 2015 as a result of personal difficulties and reasons. Those same seizures had been taken into account by BF in concluding and reaching their decision, on the balance of probabilities, that MK and his son were linked in evading excise duty.

78. MK also at the hearing gave evidence that the cutting machine was not complete and fully functioning and furthermore that he did intend to use the machine but not on the goods that were seized but in six to nine months' time.

79. In *Amber Services Europe Limited* the statement by LJ McCombe referred to the use of raw tobacco "for the purposes of making tobacco products". In this case MK said, which the Tribunal accepted, that he did not intend to manufacture the goods to "make tobacco products" but that he did plan to manufacture after having sold the goods, and he hoped further consignments of raw tobacco, in six to nine months' time from the date of seizure. At that time he would be required to register his premises as a factory for "making a tobacco product" under the Tobacco Products Regulation 2001. He said the cutting machine which it is presumed was capable of processing or manufacturing tobacco was an incomplete machine. BF's evidence of his intention to do so related, amongst others, to an association they claimed he had with his son, and his business affairs and who was the intended recipient of three consignments of successfully seized raw tobacco. MK at the hearing stated that he had no knowledge of these consignments and had had no contact with his son from a period before which the consignments had been sent.

80. The Tribunal consider that these were relevant factors not taken into account, partially as a result of MK not responding to the letter of 20th September 2017, but by that time he had already intimated an appeal against the review decision of 30 May 2017, on 26 June 2017, and the conclusions and assertions made in the letter of 20 September 2017 were not in the letter of 30 May 2017. The Tribunal considered, for the reasons stated in this judgement, that the decision appealed against of 30 May 2017 and the subsequent decision in the letter of 20 September 2017 were unreasonable.

81. The appeal is allowed.

82. In accordance with *Lindsay v Customs and Excise Commissioners* the Tribunal's powers are limited under section 16(4) Finance Act 1994. The Tribunal, accordingly, direct that BF carry out a further review of the original decision,

including the decision contained in the letter of 20 September 2017 taking into account the information contained in this judgement and which was submitted at the Tribunal hearing, and that within two months from the date of this decision

83. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

W RUTHVEN GEMMELL WS
TRIBUNAL JUDGE

RELEASE DATE: 25 MAY 2018

Appendix 1

Legislation

Customs & Excise Management Act 1979 Sections 49, 139(1), 141(1), 152, 170B

Tobacco Products Duties Act 1979 8K, 8L and 8T

Finance Act 1994 Sections 14 to 16

Interpretation Act 1978 Section 7

Volume 97 of Halsbury's Laws of England (paragraph 311)

Appendix 2

Cases Referred to

Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35, para 61

Air Canada v United Kingdom (1995) 20 EHRR 150, para 36

Lindsay v HMRC [2002] STC 588 paragraph [52]

HMRC v Lawrence Jones & anr [2011] EWCA Civ 825 per Mummery LJ at paragraph [71]

Worx Food & Beveridge BV v The Director for Border Revenue [2014] UKFTT 774 (TC), paragraphs 56, 58, 66, 80-82

Amber Service Europe Ltd v The Director of Border Rescue [2015] EWHC 3665 paragraphs [16] and [41]

Brandon v HMRC [2017] UKFTT 553 (TC) at paragraph [26])